STATE OF MICHIGAN

COURT OF APPEALS

GAIL A. ZBRANCHIK,

Plaintiff-Appellee,

v

DAVID A. KUZNER,

Defendant-Appellant,

and

TYRONE TOWNSHIP,

Defendant.

UNPUBLISHED
September 19, 2006

No. 269159
Livingston Circuit Court
LC No. 05-021237-CZ

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant,[1] David A. Kuzner, appeals as of right, pursuant to MCR 7.203(A)(1) and MCR 7.202(6)(a)(v), the trial court's denial of his motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. Because defendant is entitled to governmental immunity pursuant to MCL 691.1407(5) where his comments were within the scope of his position as a member of the township board, we reverse.

In April 2000, Tyrone Township contracted with plaintiff, Gail A. Zbranchik, for her to serve as the township assessor. Later that year, defendant was elected township clerk. In April 2001, plaintiff again contracted with the township to serve as its assessor through March 2004. In 2002, defendant appointed his wife, Mary Kuzner, to serve as deputy clerk. Initially, plaintiff and Mary got along well. According to the testimonies of various employees, the office environment was one where horseplay between employees was common. However, tensions eventually rose in the office to a point where Mary called police to intervene.

[1] The trial court dismissed Tyrone Township with prejudice pursuant to the parties' stipulation, and therefore Tyrone Township is no longer a party in this action.

At a township board meeting in February 2004, defendant provided reasons why he believed plaintiff's contract should not be renewed. Specifically, he alleged that plaintiff had assaulted and battered Mary on a number of occasions. Plaintiff was not present at the meeting but later denied these allegations. The township renewed plaintiff's contract over defendant's objections. However, the work environment did not improve and plaintiff resigned in September 2004. Following the board's acceptance of plaintiff's resignation, defendant, who was responsible for publishing the board meeting minutes in the local newspaper, caused the following remark to be published, "Received and placed on file the Township Assessor's letter of resignation. YEAH!!!!" Defendant eventually apologized to the board for inserting "YEAH!!!!" into the board meeting minutes. Also, during a conversation with a newspaper reporter, defendant stated that he would be glad to discuss plaintiff's allegations, so long as they were both hooked up to a polygraph machine.

Plaintiff filed a complaint against defendant, alleging breach of contract, gross negligence pursuant to MCL 691.1407(2), defamation, defamation per se, invasion of privacy – false light, invasion of privacy – publication of embarrassing private facts, and intentional infliction of emotional distress. Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(7), claiming he was immune from liability pursuant to MCL 691.1407(5) because he was an elective official. In particular, defendant asserted that he made the statements in question within the scope of his authority as township clerk during a quasi-legislative proceeding. The trial court denied defendant's motion, and this appeal followed.

"This Court reviews de novo a trial court's grant of summary disposition." *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). "The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties. . . . [A] court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id.* at 143-144 (internal quotes and references omitted). We also review questions of statutory construction de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

At issue is MCL 691.1407(5) which provides:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

It is undisputed that defendant was a member of the Tyrone Township board. Therefore, defendant is entitled to immunity under MCL 691.1407(5) if he was acting within the scope of his legislative authority when he committed the complained of actions. See *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 588, 592; 640 NW2d 321 (2001) (noting that a township board consists of members with equal voting power, and therefore finding that MCL 691.1407(5) was applicable to individual board members where the board members acted within the scope of their legislative authority).

"The determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *American Transmissions v Attorney General*, 454 Mich 135, 141; 560 NW2d 50 (1997), quoting *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988). And, in *American Transmissions*, the Michigan Supreme Court held that the official's motive for making the objected to statements is irrelevant, and the only relevant issue is whether the official was acting in the scope of his or her authority. *American Transmissions, supra* at 143-144.

Plaintiff contends defendant acted outside the scope of his employment by alleging that plaintiff committed various forms of assault and battery on defendant and his wife. It is undisputed that defendant was part of the township board, the board had the ability to contract with independent contractors to perform various tasks throughout the township, and the board members needed to approve any such contract. The board meeting agenda, as adopted by the board members at the beginning of the meeting, included the issue of plaintiff's contract. When defendant began speaking at the meeting, he informed the board that he thought plaintiff's contract should not be renewed. He then catalogued a number of incidents that allegedly occurred between plaintiff and Mary. Plaintiff's overall ability to foster a positive working environment is relevant to the board's renewal decision. And, other board members indicated they were previously unaware of a number of defendant's allegations. As such, we conclude that defendant was acting within the scope of his authority when he informed the board that plaintiff had allegedly committed various forms of assault and battery on he and his wife.

Plaintiff also argues defendant was not acting with the scope of his authority when he informed the board members that plaintiff had undergone hemorrhoid surgery. However, defendant revealed plaintiff's surgery in order to give context to one of the incidents of alleged assault and battery plaintiff inflicted on defendant's wife. As noted above, defendant's statements regarding the allegations of assault and battery related to whether to renew plaintiff's contract with the township. Accordingly, again we conclude that defendant was acting within the scope of his authority.

Next, plaintiff asserts defendant inserted his personal relief concerning plaintiff's resignation in the township board meeting minutes published in a newspaper. It is undisputed that one of defendant's official responsibilities was to publish the meeting minutes in the newspaper, and that defendant was the author of the complained minutes. In *Brown v Mayor of Detroit*, ___ Mich App ___; ___ NW2d ___ (2006) (Docket Nos. 259911 & 259923, issued July 27, 2006), slip op, p 17, this Court held that a city mayor acted within the scope of his employment, and was thus entitled to governmental immunity pursuant to MCL 691.1407(5), where he was responding to questions about personnel and city issues. In this case, defendant's comments as a member of the township board similarly focused on a personnel issue, namely, plaintiff' resignation. In accord with *Brown, supra*, we conclude that defendant was acting within the scope of his authority in publishing the minutes.

Plaintiff also argues defendant acted outside the scope of his employment when he inferred that she was a liar in one of the newspaper articles concerning plaintiff's resignation. However, like the relevant defendant in *Brown*, defendant in this case was responding to media

reports about a personnel and county issue, namely, the renewal of plaintiff's contract. Hence, defendant was acting within the scope of his authority with regard to this matter.

Finally, plaintiff contends MCL 691.1407(2) is also applicable to this case. It provides:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

However, MCL 691.1407(2) begins with the limiting phrase "Except as otherwise provided in this section . . . ." MCL 691.1407(5) applies to this case because defendant is an elective official, therefore, MCL 691.1407(2) is inapplicable. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 587-589; 525 NW2d 897 (1994), (this Court found that the defendant school board officials were the elective officials of their level of government, and therefore MCL 691.1407(5) was applicable and MCL 691.1407(2) was inapplicable).

Reversed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio